

## **REPRESENTATION OF A RESPONDENT IN A PROCEEDING FOR INVOLUNTARY COMMITMENT – MENTAL ILLNESS**

### **GOALS:**

- A. To actively and professionally ~~aet-serve~~ as a zealous advocate for the respondent who is the subject to a commitment proceeding for a mental disorder under §53-21-116, MCA.**
- B. To abide by specific mandatory standards of representation for Public Defenders as attorney for the respondent in an involuntary commitment proceeding.**
- C. To serve the stated interests of the respondent, to be independent from the court and other participants in the litigation, including the respondent's guardian, if any, and to be unprejudiced and uncompromised in representing the respondent.**
- D. To exercise independent and professional judgment in carrying out the duties assigned by the Court and to participate fully in the case on behalf of the respondent.**
- E. The term "involuntary commitment" in the following standards includes involuntary commitment and proceedings to extend the involuntary commitment period.**

### **I. TRAINING AND COMPETENCY:**

1. A public defender assigned to represent ~~respondents~~ a respondent in an involuntary commitment proceeding shall have a thorough understanding of involuntary commitment law as well as the mental health system.

2. To be eligible for assignment to represent respondents in involuntary commitment proceedings, counsel shall receive a minimum of ~~Twenty~~ twenty (20) hours of training and complete a minimum of ~~Ten~~ ten (10) hours of supervised on-the-job training in the duties, skills, and ethics of representing involuntary commitment respondents. This training shall include visits to a variety of treatment facilities including the Montana State Hospital. Counsel shall utilize training and support provided by the Office of ~~The Public Defender~~ the State Public Defender.

3. Counsel shall have basic knowledge of the classification of mental disorders and the ability to read and understand medical terminology related to mental disorders, developmental disabilities, chemical dependence and alcoholism. Counsel shall be familiar with the medications used to treat mental disorders, developmental disabilities, and alcoholism. Counsel shall be aware of how a particular mental disorder, developmental disability, chemical dependence or alcoholism will affect attorney-client communications and should recognize that communications may require special efforts on the part of counsel.

## **II. CASE PREPARATION:**

1. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the respondent's case and explore various mental health and social services that may be available to the respondent in the community.

2. Counsel's role of advocate and advisor must be based on knowledge of the range of services available to the respondent.

3. Counsel shall advise the respondent of all available options, as well as the practical and legal consequences of those options.

4. Counsel shall help the respondent find his or her objectives by advising him or her about the probability of success in pursuing these options. If the respondent expresses a desire to seek voluntary mental health treatment or related social services, counsel must give the respondent the necessary and appropriate advice and assistance to pursue those desires.

5. Counsel shall advocate the respondent's express wishes. The primary role of counsel is to represent the perspective of the respondent alone, ~~and not the perspective of the respondent's relatives, friends or guardian.~~ In addition, counsel will not substitute his or her judgment about what is in the best interest of the respondent. To the extent that a respondent is unable or unwilling to express personal wishes, counsel must presume that respondent does not wish to be involuntarily committed.

6. Counsel shall meet with respondent as soon as possible after notification of his or her assignment to an emergency detention or involuntary commitment case. This meeting shall be conducted in private and shall be held sufficiently before any scheduled emergency detention proceeding or involuntary commitment hearing to permit effective preparation and allow pre-hearing assistance to the respondent.

7. When meeting with the respondent for the first time, counsel shall identify himself or herself by name and by affiliation, if appropriate. If the first meeting takes place in a detention, ~~facility, or a mental health, facility~~ or other health care facility, counsel shall make it clear to the respondent that he or /she is not a member of the facility staff. Counsel shall inform the respondent that their conversation is confidential, and that the matters they discuss should not be revealed to facility staff or others in order to preserve that attorney-~~client~~ confidentiality. Counsel shall also inform the respondent that he or she has the right to remain silent prior to the commencement of any court-ordered examination and that the respondent cannot be examined without the presence of counsel.

8. During the conference, counsel shall obtain the respondent's version of the facts of the case, including:

- a. The circumstances surrounding the filing of an involuntary commitment or emergency detention petition;
  - b. The names, addresses, and telephone numbers of all persons with knowledge of the circumstances surrounding the involuntary commitment petition, or emergency detention;
  - c. Any information about past psychiatric hospitalization and treatment;
  - d. Information to aid the exploration of alternatives to commitment;
  - e. The name of a mental health professional of respondent's choice to conduct an independent evaluation.
9. During the conference, counsel shall also:
- a. Explain what is happening and why, including the basis on which the respondent's involuntary commitment is sought, and offer a description of the psychiatric examination and judicial hearing procedures;
  - b. Explain the respondent's rights in the commitment process, including the right to treatment, ~~and the right to refuse treatment,~~ and the right to an independent evaluation;
  - c. Explain that the respondent may retain his or her own counsel at his or her own expense rather than accept representation by the appointed public defender;
  - d. Explain the respondent's option to accept voluntary treatment, the procedures of exercising that option, and the legal consequences of voluntary admission to a mental health facility, ~~and discuss~~ including whether the respondent is willing to accept voluntary treatment in a mental health facility or other settings;
  - e. Obtain respondent's consent to enter into negotiations for settlement of the case with the county attorney and with mental health professionals if the respondent is willing and able to give informed consent to voluntary mental health care or related social services as an alternative to involuntary commitment;
  - f. Discuss the desirability of a court hearing with the respondent; and,
  - g. Request the respondent's written or oral permission to obtain access to relevant records, including any facility records or incident reports.
10. After being notified of the appointment, counsel shall, in preparation of any scheduled hearing, do the following:
- a. Become thoroughly familiar with the statutory requirements governing involuntary commitment in the jurisdiction, ~~as well as~~ case law and court rules;
  - b. Thoroughly review the petition, detention order, or other documents used to initiate proceedings, the screening report, the prehearing examination reports, the medical records of the respondent, the facility records of any facility in which the respondent has recently resided, and any other document relevant to the proceedings;
  - c. Attempt to interview all persons who have knowledge of the circumstances surrounding the involuntary commitment petition or

emergency detention, including the petitioners, the police officers who detained the respondent; the psychiatrists, social workers, and other persons who have examined or treated the respondent during the current involuntary commitment or emergency detention proceedings, previous mental health treatment providers, if any; the respondent's family, guardian or acquaintances; and any persons who may provide relevant information or who may be supporting or adverse witnesses at an emergency detention or involuntary commitment hearing;

- d. Facilitate the exercise of the respondent's rights to be examined by a professional person of the respondent's choice;
- e. Discuss with the respondent the various medications that the respondent has been prescribed to address the respondent's mental illness, including the effectiveness of the medication, and the long-term effects and side effects of each.

11. Counsel must ensure that a respondent's consent to voluntary treatment is knowing and not a result of coercion or undue influence. Counsel shall explain the benefits and privileges of voluntary treatment and care to all respondents as part of counsel's efforts to make respondents aware of all options available to them.

12. If the respondent indicates that he or she would consent to voluntary treatment, counsel shall:

- a. Ascertain whether the respondent was indeed aware that by electing to convert to voluntary patient status, he or she was agreeing to enter or remain in a mental health facility or begin or continue to receive mental health services; and,
- b. Make certain that this agreement was not the product of threats, unrealistic promise, or other forms of coercion.

13. If counsel has determined that the respondent's consent to voluntary treatment is knowing and uncoerced, counsel shall immediately take steps to secure the dismissal of the involuntary commitment proceeding.

14. When, due to the respondent's disability, the effect of medication, or other factors, counsel is unable to determine that the conversion to voluntary patient status was made knowingly and voluntarily, he or she shall investigate the circumstances of the respondent's stated desire to voluntarily receive treatment.

### **III. COURT PROCEEDINGS:**

1. Counsel should seek the most expedient and timely resolution of the involuntary commitment proceeding possible while providing effective and zealous advocacy for the respondent. Counsel should only seek the continuance of any phase of the involuntary commitment proceeding if it is necessary to effectively advocate for the respondent.

2. Counsel should ensure that the respondent may exercise his or her right to a jury trial. Counsel shall inform the respondent of his or her right to a jury trial and explain the benefits and detriments of a jury trial and a hearing in front of the judge alone. Counsel shall immediately notify the ~~Court~~court if respondent chooses a jury trial. If the respondent waives his or her right to a jury trial, counsel shall establish that the waiver is knowing and voluntary.

3. Counsel shall ensure that a respondent actively participates in every stage of the involuntary commitment process. Counsel shall encourage the respondent to exercise his or her right to be present at all hearings. Counsel shall advise the respondent of the legal basis under which the ~~Court~~court will order discharge, emergency detention, commitment, conditional release, revocation or modification of a trial visit, outpatient or community commitment, or an extension of the commitment period, and how the ~~Court~~court will determine the length of commitment.

4. Counsel shall avoid using his or her authority to waive respondent's presence at the hearing, except when attending would seriously jeopardize the respondent's mental or physical condition and an alternative location for the hearing in surroundings familiar to the respondent would not prevent such adverse effects upon the respondent's mental condition.

5. If the respondent waives the right to be present, counsel shall make a record of his or her advice to the respondent regarding the right to be present and the choice to waive that right. In such circumstances, counsel shall make a record of the facts relevant to the respondent's absence from the hearing.

6. If, at the time of hearing, a respondent is under the influence of psychotropic or other prescribed medications, counsel should consider introducing evidence regarding the nature of the medication and its likely effects upon the respondent's demeanor.

7. Counsel should zealously and effectively engage in all aspects of trial advocacy.

8. Counsel shall be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in involuntary commitment proceedings, such as hospital and medical records.

9. Counsel shall focus the court's attention on the legal issues to be decided, such as whether the criteria for detention or commitment have been met. Thus, in emergency detention proceedings, counsel shall seek to bifurcate the determination of whether there is probable cause for an emergency detention and the determination of the least restrictive setting for that detention. In involuntary commitment proceedings, counsel shall seek to bifurcate the determination of whether the respondent requires commitment and the post trial disposition hearing if it will advantage the respondent. Counsel shall plan objections to the admissibility of evidence regarding previous commitment and pending criminal

charges so as to preclude their consideration at least until the adjudicative issue of whether commitment is warranted has been determined.

10. During the involuntary commitment hearing, counsel shall, where it benefits the respondent, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:

- a. Whether the case for detention or commitment is based on dangerousness to self or to the person or property of others;
- b. Whether there is any real factual basis for the determination of dangerousness;
- c. The probability of dangerous behavior in the future;
- d. How well the respondent is currently functioning and whether any indications of poor functioning are due to the respondent's social situation or to mental disorder;
- e. Whether there is any useful purpose to hospitalization and whether possible alternatives exist or have been explored;
- f. Whether mental health examinations and screenings were thorough;
- g. Whether the respondent had recently been exhibiting abnormal or unusual behavior; and,
- h. The factual basis of conclusory opinions about the respondent's suitability for detention or commitment under the applicable legal standards.

11. Counsel should be aware of the basis for and file a motion to seek release from custody in the form of a ~~Writ~~ writ of Habeas habeas Corpus corpus when appropriate.

12. Counsel shall offer evidence favorable to the respondent's case and present lay and expert witnesses, including an impartial, independent mental health expert who has examined the respondent, if possible.

13. After discussions with the respondent and with his or her consent, counsel shall present all favorable evidence available regarding appropriate alternatives to involuntary commitment, including, but not limited to, voluntary mental health treatment and commitment to community-based mental health treatment and care.

14. Whether or not the commitment hearing, ~~and the~~ post trial dispositional hearing, ~~or the~~ detention proceeding, or the detention placement determination are ~~or are~~ ~~not~~ bifurcated, counsel shall offer evidence favorable to the respondent regarding the least restrictive placement for the commitment during the proceeding or part of the proceeding that constitutes the post trial dispositional hearing or detention placement determination.

15. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of committing the respondent to the most restrictive setting available, such as the Montana State Hospital. Counsel should explore and consider offering evidence of

the respondent's compliance with treatment, success in community treatment programs, and family support in the community.

16. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of an involuntary medication order. Counsel should explore and consider offering evidence regarding the medications that the respondent has found to be effective, as well as those medications which have not been effective, or cause significant long-term or side effects.

17. Counsel should consider the condition of the respondent in determining the degree to which the hearing procedures should conform strictly to the applicable rules, as some respondents may not be able to consent knowingly and voluntarily to the waiver of any procedural or evidentiary rights. Counsel should argue strict application for the burden of proof and the law ~~and~~; at all times, counsel should endeavor to preserve the record for appeal. Counsel shall review all orders and seek the amendment of orders as necessary, including the deletion of provisions not supported by the record.

18. Counsel should provide continuity in representation for the respondent throughout the involuntary commitment process. If the court has ordered the involuntary commitment, counsel shall advocate for an appropriate treatment and discharge plan to be developed which is reasonably designed to achieve the end sought in the commitment order. The treatment plan should be tailored to the respondent's needs. Counsel shall argue for the exclusion of all provisions that are unnecessarily restrictive or unsupported by the record. The treatment plan should include the following elements;

- a. All assessments of the respondent's problems and needs;
- b. A brief description of the nature and effects of service and treatment already administered to the respondent;
- c. A description of services and treatment to be administered, their possible side effects, and feasible alternatives, if any;
- d. The identities of agencies and specific individuals who will, ~~in the future,~~ provide the services and treatment in the future;
- e. The settings in which the services and treatment will be provided;
- f. A time table for attaining the goals or benefits of treatment or care to be administered;
- g. A statement of the criteria for transition to less restrictive placements or for conditional or unconditional discharge from involuntary mental health services and treatment, as well as the date for transfer or discharge; and,
- h. A statement of the least restrictive conditions necessary to achieve the purposes of hospitalization.

19. The discharge plan should include the following:

- a. An anticipated discharge date;
- b. Criteria for discharge;
- c. Identification of the facility staff member responsible for discharge planning;

- d. Identification of the community-based agency or individual who is assisting in arranging post-discharge services;
- e. Referrals for financial assistance needed by the patient upon discharge; and,
- f. Other information necessary to ensure an appropriate discharge and adequate post-discharge services.

20. Counsel who has represented a respondent preceding and during a court hearing should make every effort to maintain responsibility for the respondent's legal representation so long as the respondent remains an involuntary patient or subject to a conditional release.

21. If counsel who represented the respondent during the commitment proceeding does not continue to represent the respondent after commitment is ordered, he or she shall make all reasonable efforts to ensure that the respondent is well represented in all matters that stem from the respondent's commitment. Specific objectives include:

- a. A smooth transfer of responsibility to new counsel who assumes representation in post-hearing matters, including motions for amended findings, stays of the commitment order pending appeal, appeals, petitions for writs, periodic review hearings, court ordered release to alternative placement or treatment, and other available legal actions to contest commitment, as well as continued representation in proceedings to revoke conditional release, to extend conditions of release or the commitment period in a more restrictive setting, and other legal proceedings to extend commitment.
- b. Monitoring of the treatment and services provided a committed respondent to ensure the quality of the treatment and services.



**REPRESENTATION OF A RESPONDENT IN A PROCEEDING FOR  
INVOLUNTARY COMMITMENT  
-SERIOUS DEVELOPMENTAL DISABILITY**

**GOALS:**

- A. To actively and professionally aet-serve as a zealous advocate for the respondent who is the subject of a proceeding for commitment or re-commitment as an individual with a serious developmental disability under §53-20-112, MCA.**
- B. To abide by mandatory standards of representation for Ppublic Defenders-defenders as attorney for the respondent in an involuntary commitment proceeding.**
- C. To serve the stated interests of the respondent, to be independent from the Court-court and other participants in the litigation, including the respondent's guardian, if any, and to be unprejudiced and uncompromised in representing the respondent.**
- D. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf of the respondent.**
- E. In the following standards, "involuntary commitment" refers to both involuntary commitment and recommitment proceedings.**

**I. TRAINING AND COMPETENCY:**

1. A public defender assigned to represent a respondent in an involuntary commitment proceeding shall have a thorough understanding of involuntary commitment law as well as the developmental disabilities and mental health systems.

2. To be eligible for assignment to represent respondents in involuntary commitment proceedings, counsel shall receive a minimum of ~~Twenty~~twenty (20) hours of training and complete a minimum of ~~Ten~~ten (10) hours of supervised on-the-job training in the duties, skills, and ethics of representing involuntary commitment respondents. This training shall include visits to a variety of treatment facilities including the Montana Developmental Center and community service providers and group homes within the area served by the public defender. Counsel shall utilize training and support provided by the office of the public defender.

3. Counsel shall have basic knowledge of the classification of developmental disorders and the ability to read and understand medical terminology related to developmental disabilities, mental illness, and co-occurring disorders or dual diagnosis. Counsel shall be familiar with the medications used to treat mental disorders and developmental disabilities. Counsel shall be aware of how a particular developmental disability, ~~or~~ mental disorder, ~~or~~ chemical dependency, or alcoholism will affect the

attorney-client communications and shall recognize that communications may require assistance or special efforts on the part of counsel.

## **II. CASE PREPARATION:**

1. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the respondent's case and explore developmental health and social services that may be available to the respondent in the community.

2. Counsel's role of advocate and advisor must be based on knowledge of the range of services available to the respondent.

3. Counsel shall advise the respondent of all available options, as well as the practical and legal consequences of those options.

4. Counsel shall help the respondent determine the respondent's objectives by advising the respondent about the probability of success in pursuing those options.

5. Counsel shall advocate the respondent's express wishes. The primary role of counsel is to represent the perspective of the respondent alone, and not the perspective of the respondent's relatives, friends, or guardian. In addition, counsel shall not substitute his or her judgment about what is in the best interests of the respondent. To the extent that a respondent is unable or unwilling to express personal wishes, counsel must presume that respondent does not wish to be involuntarily committed.

6. Counsel shall meet with respondent as soon as possible after notification of his or her assignment to an involuntary commitment case. This meeting shall be conducted in private and shall be held sufficiently before any scheduled hearing to permit effective preparation and allow pre-hearing assistance to the respondent.

7. When meeting with the respondent for the first time, counsel shall identify himself or herself by name and by affiliation, if appropriate. If the first meeting takes place in a detention, facility, or mental health, or other health care facility, counsel shall make it clear to the respondent that he/she is not a member of the facility staff. Counsel shall inform the respondent that their conversation is confidential, and that the matters they discuss should not be revealed to facility staff or others in order to preserve that attorney-client confidentiality. Counsel should inform the respondent that he/or she has the right to remain silent prior to the commencement of any court-ordered examination and that the respondent cannot be examined without the presence of counsel.

8. During the conference, counsel shall obtain the respondent's version of the facts of the case, including:

- a. The circumstances surrounding the filing of the involuntary commitment;
- b. The names, addresses, and telephone numbers of all persons with knowledge of the circumstances surrounding the petition;

- c. Information about past treatment either in the community or at the Montana Developmental Center or any past psychiatric hospitalization;
  - d. Information to aid the exploration of alternatives to commitment;
  - e. The name of a developmental disabilities expert of respondent's choice to conduct an independent evaluation.
9. During the conference, counsel shall also:
- a. Explain what is happening and why, including the basis on which the respondent's involuntary commitment is sought, and offer a description of the examination conducted by the residential facility screening team and judicial hearing procedures;
  - b. Explain the respondent's rights in the commitment process, including the right to treatment and the right to refuse treatment;
  - c. Explain that the respondent may retain his or her own counsel at his or her own expense rather than accept representation by the appointed public defender;
  - d. Explain the respondent's option to accept voluntary health care or other services, the procedures to exercise that option, and the legal consequences of voluntary acceptance of such services; ~~and~~ discuss whether respondent is willing to accept those voluntary services;
  - e. As an alternative to involuntary commitment, Obtain obtain respondent's consent to enter into negotiations for settlement of the case with the county attorney if the respondent is willing and able to give informed consent to voluntary health or other services ~~as an alternative to involuntary commitment;~~
  - f. Discuss the desirability of a court hearing with the respondent; and,
  - g. Request the respondent's written or oral permission to obtain access to relevant records, including any facility records and incident reports.
10. After being notified of appointment to the case, counsel shall, in preparation of any scheduled hearing, do the following:
- a. Become thoroughly familiar with the statutory requirements governing involuntary commitment in the jurisdiction, as well as case law and court rules;
  - b. Thoroughly review the petition or other documents used to initiate the commitment proceedings, the report of the residential facilities screening team, the report by the QMRP or other case manager, ~~prehearing~~ examination reports, the medical records of the respondent, and the facility records of any facility in which the respondent has recently resided and any other document relevant to the proceedings;
  - c. Consider the advisability of seeking the services of a qualified mental retardation professional;
  - d. Attempt to interview all persons who have knowledge of the circumstances surrounding the involuntary commitment petition:
    - i. The petitioners;

- ii. The developmental disabilities professional, community services providers, facility staff, social workers, case managers, mental health professionals, and other persons who have examined or treated the respondent during the current involuntary commitment proceedings;
  - iii. Previous service providers, if any;
  - iv. The respondent's family, guardian or acquaintances;
  - v. The responsible person and the person's advocate, if any; and,
  - vi. The persons who may provide relevant information or who may be supporting or adverse witnesses at a commitment hearing.
- e. Facilitate the exercise of the respondent's right to be examined by a professional person of the respondent's choice.

11. Counsel must ensure that a respondent's consent to receive voluntary services is knowing and not a result of coercion or undue influence. Counsel shall explain the benefits and privileges of voluntary services and care to all respondents as a part of counsel's efforts to make respondents aware of all options available to them.

12. If the respondent indicates that he or she would consent to receive voluntary services, counsel shall:

- a. Ascertain whether the respondent was indeed aware that by electing to convert to voluntary status, he or she was agreeing to enter or remain in services voluntarily; and
- b. Make certain that this agreement was not the product of threats, unrealistic promise, or other forms of coercion

13. If counsel has determined that the respondent's consent to receive voluntary services is knowing and uncoerced, counsel shall immediately take steps to secure the dismissal of the voluntary commitment proceeding.

### **III. COURT PROCEEDINGS:**

1. Counsel should seek the most expedient and timely resolution of the involuntary commitment proceeding possible while providing effective and zealous advocacy for the respondent. Counsel should only seek the continuance of any phase of the involuntary commitment proceeding if it is necessary to effectively advocate for the respondent.

2. Counsel should ensure that a respondent actively participate in every stage of the involuntary commitment proceeding. Counsel shall encourage the respondent to exercise his or her right to be present at all hearings. Counsel shall advise the respondent of the legal basis under which the court will order discharge, commitment, or recommitment, and the length of commitment.

3. Counsel shall avoid using his or her authority to waive respondent's presence at the hearing except in the following extraordinary cases:

- a. When the respondent unequivocally refuses to attend and cannot be encouraged to do so;
- b. When attending would seriously jeopardize the respondent's mental or physical condition; or,
- c. When the respondent's presence at the hearing would completely disrupt and prevent a meaningful proceeding.

4. If the respondent waives the right to be present, counsel shall make a record of his or her advice to the respondent regarding the right to be present and the choice to waive that right. In such circumstances, counsel shall make a record of the facts relevant to the respondent's absence from the hearing.

5. If at the time of hearing, a respondent is under the influence of prescribed medications, counsel shall consider introducing evidence regarding the nature of the medication and its likely effects upon the respondent's demeanor.

6. Counsel shall zealously and effectively engage in all aspects of trial advocacy.

7. Counsel shall be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in involuntary commitment proceedings such as hospital and medical records.

8. Counsel shall focus the court's attention on the legal issues to be decided, such as whether the criteria for commitment have been met. Counsel shall plan objections to the admissibility of evidence regarding previous commitment and pending criminal charges, if any, so as to preclude their consideration at least until the adjudicative issue of whether commitment is warranted has been determined.

9. During the involuntary commitment hearing, counsel shall, where it benefits the respondent, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:

- a. Whether the case for commitment is based upon self-help deficits so severe so as to require total care;
- b. Whether there is a real factual basis for the determination of these deficits that would prevent safe and effective habilitation in community-based services;
- c. Whether the case for commitment is based on imminent danger to self or others;
- d. Whether there is any real factual basis for the determination of imminent danger;
- e. The probability of dangerous behavior in the future;
- f. Whether any indications of poor functioning are due to the respondent's social situation or to a mental disorder;

- g. Whether the information and the interpretation of that information relied upon by the residential facility screening team was accurate;
- h. Whether health examinations and screenings were thorough;
- i. Whether the respondent had recently been exhibiting abnormal or unusual behavior; and,
- j. The factual basis of conclusory opinions about the respondent's suitability for commitment under the applicable legal standards.

10. Counsel shall offer evidence favorable to the respondent's case and present lay and expert witnesses, including an impartial, independent developmental disabilities expert who has examined the respondent if possible.

11. After discussions with the respondent and with his or her consent, counsel shall present all evidence available that is favorable to the respondent regarding appropriate alternatives to involuntary commitment, including, but not limited to, the ability of the respondent to be served in the community, including the respondent's history of successful placement in the community, the availability of community-based services or other mechanisms to support the respondent in the community, including powers of attorney, guardianship or conservatorship.

12. Counsel shall offer evidence favorable to the respondent regarding the least restrictive placement for the commitment during the proceeding.

13. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of committing the respondent to the most restrictive setting available, such as the Montana Developmental Center. Counsel shall explore and consider offering evidence of the respondent's compliance with treatment, success in community treatment programs, and family and other support in the community.

14. Counsel shall consider the condition of the respondent in determining the degree to which the hearing procedures shall conform strictly to the applicable rules, as some respondents may not be able to consent knowingly and voluntarily to the waiver of any procedural or evidentiary rights. Counsel shall argue strict application for the burden of proof and the law and ~~at all times counsel shall endeavor~~ at all times to preserve the record for appeal. Counsel shall review all orders and seek the amendment of orders as necessary, including the deletion of provisions not supported by the record.

15. Counsel shall provide continuity in representation for the respondent throughout the involuntary commitment process. If the court has ordered involuntary commitment, counsel shall advocate for an appropriate individualized treatment plan to be developed, including a post-institutionalization plan, which contains all the elements required by law and is tailored to the respondent's needs and is reasonably designed to maximize the resident's abilities and enhance the resident's ability to cope with the environment. Counsel shall argue for the exclusion of all provisions that are

unnecessarily restrictive or unsupported by the record. The plan should include the following elements:

- a. All assessments of the respondent's specific limitations and needs;
- b. A description of intermediate and long range habilitation goals, with a projected timetable for their attainment;
- c. A statement of and an explanation for the plan of habilitation necessary to achieve the habilitation goals of the resident;
- d. A specification of the professionals and other staff members who are responsible for the particular resident's attaining these rehabilitation goals;
- e. Criteria for release to less restrictive settings for habilitation, based on the resident's needs including criteria for discharge and a projected date for discharge.

16. Counsel who has represented a respondent preceding and during a court hearing shall make every effort to maintain responsibility for the respondent's legal representation so long as the respondent remains committed.

17. If counsel who represented the respondent during the commitment proceedings does not continue to represent the respondent after commitment is ordered, he or she shall make all reasonable efforts to ensure that the respondent is well represented in all matters that stem from the respondent's commitment. Specific objectives include:

- a. A smooth transfer of responsibility to new counsel, who assumes representation in post-hearing matters, including motions for amended findings, stays of the commitment order pending appeal, appeals, petitions for writs, periodic review hearings, recommitment proceedings and other available legal actions to contest commitment;
- b. Monitoring of the treatment and services provided a committed respondent to ensure the quality of the treatment and services.

## **REPRESENTATION OF A MINOR WHO IS VOLUNTARILY COMMITTED TO A MENTAL HEALTH FACILITY UNDER §53-21-112, MCA**

### **GOALS:**

- A. To actively and effectively represent minor children in proceedings where they, or, if under the age of 16, their parents or guardian, have consented to mental health services treatment under §53-21-112, MCA, in an effective and professional manner throughout all phases of the representation.**
- B. To abide by specific mandatory standards of representation for Public public Defenders-defenders as attorney for the minor.**
- C. To serve the stated interests of the minor, to be independent from the court and other participants in the litigation, including the minor's parents or guardian, and to be unprejudiced and uncompromised in representing the minor.**
- D. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf of the minor.**

### **I. TRAINING AND COMPETENCY:**

1. A public defender assigned to represent minors who have been voluntarily admitted to mental health services under §53-21-112, MCA, shall have a thorough understanding of involuntary commitment case law, statutes, and rules, as well as the mental health system.
2. To be eligible for assignment to represent minors who have been voluntarily admitted, counsel shall receive a minimum of ~~Five-five~~ (5) hours of training, or the equivalent thereof, as certified by the ~~training~~ Training officerOfficer, completed the necessary hours for involuntary commitment training in the duties, skills, and ethics of representing involuntary commitment respondents. This training shall include visits to a variety of youth treatment facilities. Counsel shall utilize training and support provided by the ~~office of the public defender~~ Office of the State Public Defender.
3. Counsel shall be familiar with the ~~Public-public Defender-defender~~ standards for representation of a respondent in a proceeding for involuntary commitment.
4. Counsel shall have basic knowledge of the classification of mental disorders and the ability to read and understand medical terminology related to mental disorders, developmental disabilities, alcoholism, and chemical dependency. Counsel shall be familiar with the medications used to treat mental disorders, developmental disabilities, alcoholism, and chemical dependency. Counsel shall be aware of ~~hese-how~~ the minor's age, or a particular mental disorder, developmental disability, alcoholism, or chemical



dependency will affect attorney-client communications and should recognize that communications may require special efforts on the part of counsel.

## **II. CASE PREPARATION:**

1. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the minor's case and explore the range of mental health and social services that may be available to the minor in the minor's community.

2. Counsel's role of advocate and advisor must be based on knowledge of the range of services available to the minor.

3. Counsel shall advise the minor of all available options, as well as the practical and legal consequences of those options.

4. Counsel shall help the minor determine his or her objectives by advising him or her about the probability of success in pursuing those options. If the minor expresses a desire to seek voluntary mental health treatment in a particular setting or related social services, counsel must give the minor the necessary and appropriate advice and assistance to pursue those desires.

5. Counsel shall advocate the minor's express wishes. The primary role of counsel is to represent the perspective of the minor alone, and not the perspective of the minor's relatives, friends, or guardian. This is true regardless of the age of the minor. In addition, counsel will not substitute his or her judgment about what is in the best interest of the minor. To the extent that a minor is unable or unwilling to express personal wishes, counsel must presume that the minor wishes to reside in the least restrictive environment.

6. Counsel shall meet with the minor as soon as possible after notification of his or her assignment to represent the minor. This meeting shall be conducted in private and shall be held sufficiently before any scheduled legal proceeding to permit effective preparation and allow pre-hearing assistance to the minor.

7. When meeting with the minor for the first time, counsel shall identify himself or herself by name and by affiliation, if appropriate. If the first meeting takes place in a ~~detention facility, or a mental health facility or other health care~~ healthcare facility, counsel shall make it clear to the minor that he ~~/or~~ she is not a member of the facility staff. Counsel shall inform the minor that their conversation is confidential, ~~and~~ and that the matters they discuss should not be revealed to facility staff or others in order to preserve ~~that the attorney-client confidentiality, and that he/she has the~~ Counsel shall also inform the minor client of the right to remain silent prior to the commencement of any court-ordered examination and that the minor cannot be examined without the presence of counsel.

8. During the conference, counsel shall obtain the following:
  - a. The circumstances that brought about the attorney's assignment, including the voluntary admission, the minor's age at admission, the extent to which the minor's parents or guardian participated in that decision, and the reason that the minor asked for counsel if that request brought about the assignment;
  - b. The names, addresses, and telephone numbers of all persons with knowledge of those circumstances;
  - c. Any information about the minor's past mental health treatment;
  - d. Information to aid the exploration of the minor's choices for treatment;
  - e. The name of a mental health professional of the minor's choice to conduct an independent evaluation.
9. During the conference, counsel shall also:
  - a. Explain what is happening and why, including a description of the judicial hearing if one is pending;
  - b. Explain the minor's rights in that process as well as the minor's rights regarding voluntary admission to mental health services; and
  - c. Explain that the minor may retain his or her own counsel at his or her own expense rather than accept representation by the appointed public defender.
10. Immediately after being assigned, counsel should review the file and should inform other parties and other counsel of his or her assignment; and that, as counsel of record, he or she should receive copies of any pleadings, discovery exchanges, and reasonable notification of hearings and major changes of circumstances in the case.
11. Immediately after being assigned, counsel should meet with the minor adapting all communications to the minor's level of education, cognitive development, cultural background, and degree of language acquisition. Counsel should inform the minor about the court system, the proceedings, and counsel's responsibilities. Counsel should elicit and assess a minor's views and concerns of the case.
12. Counsel shall encourage and support the minor in maintaining contact with family members and friends if the minor so desires and when doing so would benefit the minor.
13. Counsel should thoroughly explain to the minor the requirements for a valid voluntary admission to a mental health facility under §53-21-111, MCA, and discuss all practical and legal considerations that flow from their admission.
14. If counsel believes it to be appropriate, counsel should seek to have a medical evaluation of the minor done by a qualified physician of the minor's choosing, and preserve said examination for further use on behalf of the minor.

15. Counsel should conduct thorough, continuing and independent investigations, including reviewing the minor's social service records, mental health records, if applicable, drug and alcohol related records, medical records, law enforcement records, and other records relevant to the case.

16. If the public defender was assigned to the case because there is an upcoming legal proceeding, such as an involuntary commitment proceedings, counsel will follow the appropriate ~~Public-public Defender-defender~~ Standards-standards as well as these ~~standards~~Standards.

17. Counsel must ensure that a minor's consent to voluntary treatment is knowing and not a result of coercion or undue influence. Counsel shall explain the benefits and privileges of voluntary treatment and care to the client.

18. If the minor indicates that he or she would consent to voluntary treatment, counsel shall:

- a. Determine ~~Whether-whether~~ the minor was indeed aware that by electing to receive voluntary patient status, he or she was agreeing to enter or remain in mental health services; and,
- b. Make certain that this agreement was not the product of threats, unrealistic promise, or other forms of coercion.

19. If counsel has determined that the minor's consent to voluntary treatment is knowing and uncoerced, counsel shall immediately take steps to secure the dismissal of the involuntary commitment proceeding.

20. When, due to the minor's disability, the effect of medication, or other factors, counsel is unable to determine that the consent to voluntary patient status was made knowingly and voluntarily, he or she shall investigate the circumstances of the minor's stated desire to voluntarily receive treatment.

### **III. HANDLING THE CASE:**

1. In preparation for court hearings, counsel must thoroughly prepare for trial, the examination of both law and expert witnesses (~~both lay and expert~~), submission of trial briefs and stipulations, and all evidentiary considerations.

2. At any court proceedings, counsel should present and cross examine witnesses, and offer exhibits as necessary, and ~~where appropriate~~ introduce evidence where appropriate, and make arguments on the minor's behalf, and ensure that a written order is made and conforms to the court's oral rulings and statutorily required findings and notices. Counsel should abide by the minor's decisions about the representation with respect to each issue on which the minor is competent to direct counsel. Counsel should pursue the minor's expressed objectives.

3. Counsel should participate in, and, when appropriate, initiate negotiations and settlement discussions if authorized by the client. Counsel should also participate in all depositions, pre-trial conferences, and hearings.

4. Counsel should determine and advocate for, on behalf of the minor, the least restrictive alternatives to meet the needs and wishes of the minor.

5. After the initial disposition of the case, counsel should discuss the end of the legal representation with the minor and discuss all avenues of appeal and other assistance in the future on behalf of the minor.

6. When counsel's representation terminates, counsel shall cooperate with the minor and any succeeding counsel in the transmission of the record, transcripts, file, and other pertinent information.

7. Counsel should provide continuity in representation for the minor. Counsel shall advocate for an appropriate treatment and discharge plan to be developed. The treatment plan should be tailored to the minor's needs. Counsel shall argue for the exclusion of all provisions that are unnecessarily restrictive or unsupported. The treatment plan should include the following elements:

- a. All assessments of the minor's problems and needs;
- b. A brief description of the nature and effects of service and treatment already administered to the minor;
- c. A description of services and treatment to be administered, their possible side effects and feasible alternatives, if any;
- d. The identities of agencies and specific individuals who will, in the future, provide the services and treatment;
- e. The settings in which the services and treatment will be provided;
- f. A time table for attaining the goals or benefits of treatment or care to be administered;
- g. A statement of the criteria for transition to less restrictive placements, as well as the date for transfer or discharge; and,
- h. A statement of the least restrictive conditions necessary to achieve the purposes of treatment.

8. The discharge plan should include the following:

- a. An anticipated discharge date;
- b. Criteria for discharge;
- c. Identification of the facility staff member responsible for discharge planning;
- d. Identification of community-based agency or individual who is assisting in arranging post discharge services;
- e. Referrals for financial assistance needed by the patient upon discharge; and,
- f. Other information necessary to ensure an appropriate discharge and adequate post discharge services.

9. Counsel who has represented a minor pursuant to §53-21-112, MCA, should make every effort to maintain responsibility for the minor's legal representation so long as the respondent remains a minor subject to a voluntary admission or involuntary commitment.

10. If counsel who represented the minor does not continue to represent the minor, he or she shall make all reasonable efforts to ensure that the respondent is well represented in all matters that stem from the minor's admission pursuant to §53-21-112, MCA. Specific objectives include:

- a. A smooth transfer of responsibility to new counsel who assumes representation of the minor, including representation in matters including the periodic review of the minor's status; and,
- b. Monitoring of the treatment and services provided a committed respondent to ensure the quality of the treatment and services.

## **REPRESENTATION OF PARENTS IN DEPENDENT/NEGLECT CASES**

### **GOALS:**

- A. To actively, professionally, and zealously advocate for parents whose children are the subject of actions under the Child Abuse and Neglect laws of Montana and afford them every legal opportunity to preserve their parental rights.**
- B. To serve the state interest of the client, and be independent from the court and other participants in the litigation, including the client's parents or guardians, and be unprejudiced and uncompromised in representing the client. Attorneys representing parents shall comply with the general standards for public defenders as well as these specific standards.**

### **I. TRAINING:**

1. To be eligible for assignment to represent parents in these court proceedings, counsel shall receive a minimum of ~~Sixteen~~ sixteen (16) hours of training in representing parents of which at least ~~Four~~ four (4) hours were devoted to the Indian Child Welfare Act.

- 2. Counsel shall be knowledgeable in the following areas:
  - a. Legislation and case law on abuse and neglect, termination of parental rights, and adoption of children with special needs;
  - b. The causes and available treatments of child abuse;
  - c. Child welfare and family preservation services available in the community and the problems they are designed to address;
  - d. Services the State will and won't routinely pay for;
  - e. The structure and functioning of Child and Family Services of the Department of Public Health and Human Services;
  - f. Local experts who can provide attorneys with consultation and testimony on the reasonableness and appropriateness of efforts to maintain or return the child to the home;
  - g. Local and state experts who can provide attorneys with consultation and testimony of the special needs of Indian children and cultural differences;
  - h. Child and adolescent development;
  - i. Brain development and the affect of trauma on brain development;
  - j. Substance abuse issues;
  - k. Mental health issues; and
  - l. Disability issues.

## II. CASE PREPARATION:

1. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the various health and social services that may be available to the parent in the community.

2. Counsel shall advise the parent of all available options, as well as the practical and legal consequences of those options.

3. If the client is a parent whose location is unknown, all standard means, such as (telephone book, internet, and putative father registry, etc.) shall be used to locate the parent. Other parents who are available shall be consulted as to the location of the missing parent.

4. Counsel shall actively represent the client at all stages of the proceeding. When the public defender becomes aware of the assignment, the public defender shall meet with the client as soon as possible and sufficiently before any scheduled hearing or proceeding, including the show cause hearing, to permit effective preparation.

5. When meeting with the parent for the first time, counsel shall identify himself or herself by name and affiliation, if appropriate. If the first meeting takes place in a detention facility, ~~or a mental health facility or other health care~~ healthcare facility, counsel shall make it clear to the minor that he/ or she is not a member of the facility staff. Counsel shall inform the parent that their conversation is confidential, and that the matters they discuss should not be revealed to facility staff or others, in order to preserve that attorney-client confidentiality. Counsel shall also inform the parent ~~and that s/he~~ or she has a right to remain silent.

6. During the conference, counsel shall:

- a. Explain the issues and possible dispositions;
- b. Explain the court process, timelines, and the role of all the parties involved, such as judge, prosecutor, ~~GAL~~ guardian ad-litem, and parent;
- c. Inform the parent not to make statements to anyone concerning the case without prior consultation with counsel;
- d. Obtain signed releases for medical and mental health records, employment records, ~~etc. and other necessary records~~. Counsel should advise the client of the potential use of this information and the privileges that attach to this information;
- e. Obtain information from the client concerning the facts and whether there were any statements made, witnesses, and other relevant information.

7. If counsel is unable to communicate with the client because of language or disability, counsel shall use the experts necessary to ensure the ability to communicate with the client.

### **III. HANDLING THE CASE:**

1. Counsel should seek the most expedient and timely resolution of the proceeding possible while providing effective and zealous advocacy for the client. Counsel should only seek the continuance of any phase of the proceedings if it is necessary to effectively advocate for the client.

2. Counsel shall be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in such proceedings, such as reports from agency ~~employees~~employees, as well as substantive law in these proceedings.

3. In preparation for any proceedings such as show cause, adjudicatory or termination, counsel should:

- a. Review the petition and all other evidence;
- b. Prepare the client for the proceeding, explain the issues involved, and the alternatives open to the judge;
- c. If the child has already been removed from the home, determine the basis for the removal;
- d. Determine the actions taken by the ~~state~~State to investigate other possible actions ~~taken~~ to protect the child without removal, such as locating a non-custodial parent or relative, identifying services to address the needs of the parent and child, including intensive home-based services, and other services, such as disability support services, ~~etc.~~
- e. Review all statements, documents, ~~and reports,~~ and documentary evidence, including medical records, if any, and discuss these documents with the client;
- f. Familiarize himself or herself with relevant law; and,
- g. Interview all witnesses, favorable and adverse.

4. During any proceedings, counsel shall, where it benefits the client:

- a. Examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence;
- b. Offer evidence favorable to the client's case, if available; and,
- c. Determine whether an expert is needed to assist in preparation of the parent's case.

5. During the show cause hearing, counsel shall examine witnesses as to:

- a. Whether the agency has made all reasonable efforts to explore services that will allow the child to remain safely at home and avoid protective placement of the child;
- b. Whether there are other responsible relatives or adults available who may be able to care for the child or provide additional supervision;



- c. The accuracy of the facts contained in the petition or affidavit in support of intervention; and,
  - d. If the court grants the ~~state's~~ State's request and orders the child to be removed from the home, counsel shall challenge unnecessary supervision and restrictions on visitation.
6. In preparation for an adjudicatory hearing, counsel shall:
- a. Determine what actions the client has taken since the preliminary proceeding, if there was one, to address the concerns of the state as to the safety of the child, and discuss with the client the treatment or other services to which the client would voluntarily agree;
  - b. Investigate whether the agency made reasonable efforts to prevent the need for placement and safely reunify the family, such as identifying services available to protect the child without removal, ~~such as in-home~~ baby sitters, intensive home-based services, and other services that address the needs of the parent and child, including disability support services, and whether the agency has taken prompt steps to evaluate relatives as possible caretakers.
7. At the adjudicatory hearing, counsel shall, where it benefits the client, examine and cross-examine adverse lay and expert witnesses, and challenge other non-testimonial evidence regarding:
- a. The accuracy of the facts presented by the ~~state~~ State to prove abuse or neglect of the child;
  - b. ~~In-f~~ Actual basis of opinions presented by the ~~state~~ State to prove abuse or neglect of the child;
  - c. Whether the agency failed to provide services that would have allowed the child to stay safely in the home;
  - d. If the court grants the ~~state's~~ State's request and orders the child to be removed from the home, counsel shall challenge unnecessary supervision and restrictions on visitation. In addition, after consultation with the client, counsel shall consider offering evidence to the court of treatment or services in which the client would voluntarily participate to obviate the need for a treatment plan; or, if a treatment plan is ordered, to include in the treatment plan. Counsel shall challenge conditions in the treatment plan that are not justified or supported by the record.
8. Prior to making admissions or stipulations or agreeing to voluntarily place the child or relinquish any right to visitation with the child, counsel must:
- a. Ensure that the client understands the consequences of such a decision;
  - b. Make it clear to the client that the ultimate decision to make the admission or voluntarily place the child has to be made by the client;
  - c. Investigate and candidly explain to the client the prospective strengths and weaknesses of the case, including the availability of the ~~state's~~ State's witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of any adjudication;

- d. Be satisfied that the admission is voluntary, that there is a factual basis for the admission, and that the client understands the right being waived; and,
- e. Be aware of the effect the client's admission will have on any other court proceedings or related issues.

9. Counsel's recommendation on the advisability of an admission should be based on a review of the complete circumstances of the case and the client's situation.

10. Where counsel believes that the client's desires are not in the client's best interest, counsel may attempt to persuade the client to change his or her position. If the client remains unpersuaded, however, counsel should assure the client he or she will defend the client vigorously.

11. Notwithstanding the existence of ongoing negotiations with the ~~state~~State, counsel should continue to prepare and investigate the case in the same manner as if it were going to proceed to a ~~proceeding~~hearing on the merits.

12. In preparation for a disposition hearing, counsel should:

- a. Determine what actions the client has taken since the adjudicatory proceedings to address the concerns of the ~~state~~State as to the safety of the child;
- b. Investigate what the agency has done to explore services that will allow the child to remain safely at home; and,
- c. Determine what sort of disruption that the removal of the child has caused the child and the family.

13. In the disposition hearing, counsel shall, where it benefits the client, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:

- a. Whether, if the agency objects to placing the child with the parent, the agency sufficiently explored and provided services that would have allowed the child to reside safely in the parent's home;
- b. Whether the agency appropriately considered the non-custodial parent or other family members as caretakers; and,
- c. The factual basis of the agency's recommendations for placement outside of the home.

14. If the court grants the ~~state's~~State's request and orders the child to be removed from the home, counsel shall challenge unnecessary supervision and restrictions on visitation.

15. In preparation for a permanency hearing, and, if parental rights have not been terminated, counsel should:

- a. Keep in contact with the client and determine what actions the client has taken to address the concerns of the ~~state~~State as to the safety of the child;

- b. Investigate what the agency has done to explore services that will allow the child to live safely with the parent; and,
  - c. Determine what sort of disruption the removal of the child has caused the child and the family.
16. In preparation for a parental rights termination proceeding, counsel should:
- a. Determine what actions the client has taken to address the concerns of the ~~state~~State as to the safety of the child;
  - b. Investigate what the agency has done to explore services that will allow the child to remain safely in the home; and,
  - c. Determine what sort of disruption that the removal of the child has caused the child and the family.
17. In a parental rights termination proceeding, counsel shall, where it benefits the client, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:
- a. Whether the statutory grounds for termination have been met;
  - b. Whether termination is in the best interest of the child;
  - c. Whether the agency made reasonable efforts to prevent the need for termination and safely reunify the family, such as identifying services available to protect the child without removal, ~~such as~~ in-home baby sitters, intensive home-based services, and other services that address the needs of the parent and child, including disability support services;
  - d. Whether the treatment plan, if one was required, was appropriate.

## **REPRESENTATION OF A RESPONDENT IN A GUARDIANSHIP OR CONSERVATORSHIP PROCEEDING**

### **GOALS:**

- A. To advocate zealously and professionally for the respondent who is the subject of a guardianship or conservatorship proceeding.**
- B. To abide by mandatory and specific standards of representation for ~~Public~~public ~~Defenders~~defenders as attorney for the respondent in a guardianship or conservatorship proceeding.**
- C. To serve the stated interests of the respondent, to be independent from the ~~Court~~court and other participants in the litigation, including the respondent's guardian, if any, and to be unprejudiced and uncompromised in representing the respondent.**
- D. To exercise independent and professional judgment in carrying out the duties assigned by the ~~Court~~court and to participate fully in the case on behalf of the respondent.**
- E. Ensure that a guardianship, if ordered, encourages the development of maximum self-reliance and independence of the respondent, and is ordered only to the extent that the respondent's actual mental and/or physical limitations require.**

### **I. TRAINING AND COMPETENCY:**

1. A public defender assigned to represent respondents in a guardianship or conservatorship proceeding should have a thorough understanding of the law governing guardianship or conservatorship proceedings, as well as the social services, health care services, and other supports or legal arrangements, including powers of attorney, trusts, and advanced directives that, if employed, may obviate the need for guardianship or conservatorship.

2. To be eligible for assignment to represent respondents in guardianship or conservatorship proceedings, counsel shall receive a minimum of ~~Four~~four (4) hours of training, or the equivalent thereof as certified by the ~~training~~Training officer~~Officer~~, completed the necessary hours for involuntary commitment in the duties, skills, and ethics of the representation of respondents. Counsel shall utilize training and support provided by the ~~office of the public defender~~Office of the State Public Defender.

3. Counsel shall have basic knowledge of various mental and physical illnesses and disabilities, including mental illness and developmental disabilities, the features of those disabilities and illnesses, and the available treatments. Counsel should also have the ability to read and understand medical terminology related to these disabilities.

Counsel should be aware of how a particular disability, illness or condition will affect the attorney-client communications and shall recognize communications may require additional efforts on the part of counsel. Counsel should also have familiarity with people with disabilities who function independently using alternative and less intrusive supports such as powers of attorney, trustees, and payees, etc.

## **II. CASE PREPARATION:**

1. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the respondent's case and explore various social and health care services that may be available to the respondent in the community.

2. Counsel's role of advocate and advisor must be based on the knowledge of the range of services available to the respondent.

3. Counsel shall advise the respondent of all available options, as well as the practical and legal consequences of those options. If, for any reason, counsel believes that the respondent may have difficulty understanding or retaining information, counsel shall also provide this information in written format or any other alternative format that would assist the respondent to understand and retain the information and provide the same information to any advisor the ward authorizes to receive the information.

4. Counsel shall help the respondent determine his or her objectives by advising him or her about the probability of success in pursuing those options. If the respondent expresses a desire to seek social services or other ~~supports~~ support that would obviate the need for guardianship or conservatorship, or would support the respondent to the extent that only limited guardianship or conservatorship would be warranted, counsel must give the respondent the necessary and appropriate advice and assistance to pursue those desires.

5. Counsel shall advocate the respondent's express wishes. The primary role of counsel is to represent the perspective of the respondent and not to substitute his or her judgment about what is in the best interests of the respondent. To the extent that a respondent is unable or unwilling to express personal wishes, counsel shall advocate the position that best safeguards and advances the respondent's interests in liberty.

6. Counsel shall meet with respondent as soon as possible after notification of his or her assignment to a guardianship or conservatorship proceeding case. This meeting shall be conducted in private and shall be held sufficiently before any scheduled hearings to permit effective preparation and allow pre-hearing assistance to the respondent, including but not limited to, allowing time to interview the respondent.

7. When meeting with the respondent for the first time, counsel shall identify himself or herself by name and by affiliation, if appropriate. If the first meeting takes place in a ~~health care~~ healthcare or residential facility, counsel shall make it clear to the

respondent that he/or she is not a member of the facility staff. Counsel shall inform the respondent that their conversation is confidential, and that the matters they discuss should not be revealed to facility staff or others in order to preserve that attorney/-client confidentiality. Counsel should inform the respondent that he/or she has the right to remain silent prior to the commencement of and during any court ordered examination and that the respondent cannot be examined without the presence of counsel.

8. During the conference, counsel should obtain the respondent's version of the facts of the case, including:

- a. The circumstances surrounding the filing of a guardianship or conservatorship petition;
- b. The names, addresses, and telephone numbers of all persons with knowledge of the circumstances surrounding the guardianship or conservatorship petition;
- c. Any information about past hospitalization and treatment;
- d. Information about past guardianships, conservatorships, payeeships, valid or void durable powers of attorney, or other forms of substituted judgment to which the respondent may have been subject;
- e. Information to aid the exploration of alternatives to guardianship or conservatorship;
- f. Preferences for a guardian or conservator and any past conflicts or financial relationships between the person or persons seeking to be appointed guardian or conservator and the respondent;
- g. The income and assets that the respondent is aware that he or she owns, any concerns that the respondent has about the management of those assets, any gifts or transfers in trust to the proposed guardian or conservator or others that the respondent has made at any time within the last ten years, any provisions the respondent has made for the transfer by gift or inheritance of his or her assets to anyone, any obligation or desire the ward has to support others, any wishes the ward has for the priority in the use of his or her assets and any other information that may help counsel understand the ability of the ward to understand, identify, direct the management of and select the natural successors in interest to his or her assets. If the respondent has a deteriorating condition, counsel should consider tape recording or otherwise preserving this conversation in detail, including when, where, and with whom it occurred.

9. During the conference, counsel shall also:

- a. Explain what is happening and why, including the basis on which the guardianship or conservatorship is sought, and offer a description of the court appointed physician's examination, the visitor's interview, and judicial hearing procedures;
- b. Explain the respondent's rights in the process;
- c. Explain that the respondent may retain his or her own counsel at his or her own expense rather than accept representation by the appointed public defender and the financial ramifications of each choice;

- d. Explain the respondent's option to accept community services or supports as well as the legal options, including powers of attorney, use of payees, the formation of trusts, or the issuance of advance directives that may obviate the need for guardianship or conservatorship, the procedures of exercising these options and the legal consequences of these decisions;
- e. Obtain his or her consent to enter into negotiations for settlement of the case with the petitioner if the respondent is willing and able to receive services, or supports, or enter into other legal arrangements as an alternative to guardianship or conservatorship;
- f. Discuss the desirability of a court hearing with the respondent; and,
- g. Request the respondent's written or oral permission to obtain access to relevant records.

10. After being formally appointed, counsel shall, in preparation of any scheduled hearing, do the following:

- a. Become thoroughly familiar with the statutory requirements governing guardianship and conservatorship in the jurisdiction as well as case law and court rules;
- b. Thoroughly review the petition or other documents used to initiate the proceedings, the visitor's report, the court appointed physician's report, the medical records of the respondent, and any other document relevant to the proceedings;
- c. Attempt to interview all persons who have knowledge of the circumstances surrounding the guardianship or conservatorship proceeding petition, including, but not limited to, the following:
  - i. The petitioner(s);
  - ii. The proposed guardian(s);
  - iii. The health care professionals or social workers, who have recently examined or treated the respondent;
  - iv. Previous treatment providers, if any;
  - v. The respondent's family, friends, partners, or acquaintances; and,
  - vi. Persons who may provide relevant information or who may be supporting or adverse witnesses at a hearing.
- d. Obtain a medical examination of the respondent sufficiently thorough to rule out treatable health conditions that may be responsible for any cognitive impairments or behavioral deficits.

11. Counsel must ensure that a respondent's consent to voluntary services or supports, or to entering into legal arrangements as an alternative to guardianship or conservatorship, is known and not a result of coercion or undue influence. Counsel shall explain the benefits and privileges of each as part of counsel's efforts to make the respondent aware of all options available to him or her.

12. If the respondent indicates that he or she would consent to voluntary services or supports, or to entering into legal arrangements as an alternative to guardianship or conservatorship, counsel shall:

- a. Ascertain whether the respondent was indeed aware of the consequences of electing to do so; and,
- b. Make certain that this agreement was not the product of threats, unrealistic promises, or other forms of coercion.

13. If counsel has determined that the respondent's consent to voluntary services or supports, or to entering into legal arrangements, is not knowingly and uncoerced, counsel shall immediately take steps to arrange such services or draft such legal documents and to request dismissal of the guardianship or conservatorship proceeding.

14. When, due to the respondent's disability, the effect of medication, or other factors, counsel is unable to determine that the consent to voluntary services or supports, or to entering into legal arrangements, was made knowingly and voluntarily, he or she shall investigate the circumstances of the respondent's stated desire.

### **III. COURT PROCEEDINGS:**

1. Counsel should seek the most expedient and timely resolution of the guardianship or conservatorship proceeding possible while providing effective and zealous advocacy for the respondent. Counsel should only seek the continuance of any phase of the proceeding if it is necessary to effectively advocate for the respondent.

2. Counsel should ensure that the respondent may exercise his or her right to a jury trial. Counsel shall inform the respondent of his or her right to a jury trial and explain the benefits and detriments of a jury trial, and a hearing in front of the judge alone. Counsel shall immediately notify the court if the respondent chooses a jury trial. If the respondent waives his or her right to a jury trial, counsel shall establish that the waiver is knowing and voluntary.

3. Counsel shall ensure that a respondent actively participates in every stage of the guardianship or conservatorship proceeding. Counsel shall encourage the respondent to exercise his or her right to be present at all hearings.

4. Counsel shall avoid using his or her authority to waive the respondent's presence at the hearing except in the following extraordinary cases:

- a. When the respondent unequivocally refuses to attend and cannot be encouraged to do so;
- b. When attending would seriously jeopardize the respondent's mental or physical condition; or,
- c. When the respondent's presence at the hearing would completely disrupt and prevent a meaningful proceeding.

5. If the respondent waives the right to be present, counsel shall make a record of his or her advice to the respondent regarding the right to be present and the choice to



waive that right. In such circumstances, counsel shall make a record of the facts relevant to the respondent's absence from the hearing.

6. If, at any time, ~~of~~ of the hearing a respondent is under the influence of prescribed medications, counsel should consider introducing evidence regarding the nature of the medication and its likely effects upon the respondent's demeanor.

7. Counsel should zealously and effectively engage in all aspects of trial advocacy.

8. Counsel shall be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in guardianship or conservatorship proceedings, such as medical records, legal records arising in attorney/-client conversations, wills, advance directives, durable powers of attorney, oral gifts, transfers in trust, and financial records, among others.

9. Counsel shall focus the court's attention on the legal issues to be decided, such as whether the criteria for incapacity of the ward have been met. Thus, counsel shall seek to bifurcate the determination of the ward's incapacity with the determination of the identity of the guardian or conservator.

10. During the guardianship or conservatorship hearing, counsel shall, where it benefits the respondent, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:

- a. Whether the case for guardianship or conservatorship is based on:
  - i. The respondent's lack of sufficient understanding or capacity to make or communicate responsible decisions concerning the respondent's personal care including safe living arrangements;
  - ii. The impairment of the respondent's judgment so that the respondent is not capable of realizing and making rational decisions regarding medical or mental health treatment or handling day to day financial matters, or complex business or contract matters; or,
  - iii. The respondent's susceptibility to exploitation.
- b. Whether there is any real factual basis for the petition;
- c. How well the respondent is currently functioning and whether any indications of poor functioning are due to the respondent's social situation, income, or factors other than the prospective incapacity;
- d. Whether possible alternatives have been explored, including community supports through ~~meals~~ Meals on wheels Wheels, in-home care, personal care attendants, visiting nurses, durable powers of attorney, payeeship, and trusts, among others;
- e. Whether a limited or temporary guardianship or conservatorship or protective order has been explored;
- f. Whether health examinations were thorough;
- g. Whether the respondent had recently been exhibiting abnormal or unusual behavior;

- h. The factual basis of conclusory opinions about the respondent's incapacity;
- i. Whether the proposed guardian or conservator is qualified to serve in that role;
- j. Whether the respondent approves of the proposed guardian or conservator; and,
- k. Whether the proposed guardian or conservator has a conflict of interest based on past gifts, transfers, disputes, financial or familial relationships, business dealings or partnerships, proposed inheritance, or otherwise.

11. Counsel shall offer evidence favorable to the respondent's case and present lay and expert witnesses. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the respondent's incapacity under the applicable legal standards.

12. After discussions with the respondent and with his or her consent, counsel shall present all evidence available regarding appropriate alternatives to full guardianship or conservatorship, including, but not limited to, voluntary community support and health care services and legal arrangements including powers of attorney, trusts, and advance directives.

13. Counsel shall offer all evidence available that is favorable to the respondent regarding the least restrictive guardianship, such as a limited guardianship, temporary guardianship, or protective order.

14. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of appointing a full guardian, the most restrictive guardianship available.

15. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of the limitation of any civil or political rights of the respondent, including, but not limited to, the right to make medical decisions, including end of life decisions, the right to privacy, including the right to make family decisions including marriage, parenting, and relationships, the right to association, the right of free speech and expression, the right to make or change a will, and the right to vote.

16. Counsel should consider the condition of the respondent in determining the degree to which the hearing procedures should conform strictly to the applicable rules, as some respondents may not be able to consent knowingly and voluntarily to the waiver of any procedural or evidentiary rights. Counsel should argue strict application for the burden of proof and the law; and, at all times, ~~counsel should endeavor to preserve the~~ record for appeal. Counsel shall review all orders and seek the amendment of orders as necessary, including the deletion of provisions not supported by the record and the law.

17. Counsel should provide continuity in representation for the respondent throughout the guardianship or conservatorship process. If the court orders a guardianship or conservatorship, counsel shall make every attempt to ensure that the order explicitly and narrowly defines the rights restricted by the guardianship and conservatorship.

18. Counsel shall also make every attempt to ensure that the guardianship or conservatorship order is fashioned to encourage the development of maximum self-reliance and independence of the respondent and is only as broad as is necessary given the respondent's actual mental and/or physical limitations.

19. Counsel shall seek to submit testimony or other evidence regarding the ward's preferred living situations, preferred treatment options, the sale or disposition of his or her home, cars, ranch, business or other assets of significant value. To the extent feasible, counsel should make the wishes of the ward clear to the court and the appointed guardian or conservator to provide direction in the future management of the ward or the ward's estate.

20. Counsel shall also request that the court calendar an immediate ~~Ninety~~ninety (90) day inventory, annual accountings, guardian annual reports, and other matters, including court review and approval of any anticipated sale or dispersal of significant assets of the respondent, especially ~~plants~~plans to "~~spend down~~down" those assets to qualify the respondent for governmental benefits, to ensure that should a guardian or conservator be appointed, the guardian or conservator does not proceed without appropriate court supervision. In addition, counsel shall request that the court prohibit the guardian from receiving compensation from the ward or ward's estate unless the guardian has provided prior notice to the court and all interested parties of the rate of compensation, and for what services the compensation will be paid.

**REPRESENTATION OF PERSONS IN A PROCEEDING  
TO DETERMINE PARENTAGE UNDER THE UNIFORM  
PARENTAGE ACT (§40-6-119, MCA)**

**GOALS:**

- A. To actively and effectively represent clients in proceedings to determine parentage under §40-6-119, MCA, in an effective and professional manner throughout all phases of the case.**
- B. To serve the interest of the client and to be independent from the court and other participants in the litigation and be unprejudiced and uncompromised in representing the client.**
- C. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf on the client.**

**I. TRAINING AND COMPETENCY:**

- 1. Absent a knowing and intelligent waiver by the party represented, all attorneys who represent parties in proceedings under the Parentage Act must receive a minimum of ~~Two~~two (2) hours of training, specific to the representative of punitive parents under the Act.
- 2. All attorneys must have a working knowledge of the Uniform Parentage Act, statutes, and rules, as well as cases interpreting and applying them.
- 3. In addition to basic legal knowledge, the ~~attorneys~~attorney must have and continue to develop basic trial skills, basic advocacy skills, relevant motion practice, and a sufficient understanding of writ and appellate practice to advise a client whether and how to seek such remedies and to protect the record in the District Court.

**II. HANDLING THE CASE:**

- 1. Counsel should accept the appointment with the full understanding of the issues and functions to be performed. If counsel considers parts of the appointment to be confusing or incompatible with his or her ethical duties, counsel should inform the court of the conflict and ask the court to clarify or change the terms of the appointment.
- 2. Immediately after being appointed, counsel should review the file and should inform other parties and other counsel of his or her appointment, and that as counsel of record he or she should receive copies of pleadings, discovery exchanges, and reasonable notification of hearings and major changes of circumstances in the case.

3. Immediately after being appointed, counsel should meet with the punitive parent, adapting all communications to the client's level of education, cognitive development, cultural background, and degree of language acquisition. Counsel should inform the client about the court system, the proceedings, and counsel's responsibilities. Counsel should illicit and assess a client's views and concerns of the case.

4. Counsel should develop a theory or strategy of the case to implement at hearings, including presentation of factual and legal issues.

5. Counsel should conduct thorough, continuing, and independent investigations, including reviewing the client's social service records, mental health records, if applicable, drug and alcohol related records, medical records, law enforcement records, and other records relevant to the case.

6. Counsel should conduct exhaustive discovery including, where necessary, depositions, written interrogatories, production of documents, subpoena *duces tecum*, physical examinations, and requests for admissions.

7. In preparation for court hearings, counsel needs to complete exhaustive trial preparation, witness preparation (of both lay and expert), witnesses, preparation of trial briefs and stipulations, and all evidentiary considerations.

8. Counsel should stay apprised of other court proceedings affecting the client, the parties, and other household members.

9. Counsel should attend meetings involving issues within the scope of the case and take any necessary and appropriate action to expedite the proceedings.

10. Counsel should participate in, and, when appropriate, initiate negotiations and settlement discussions. Counsel should also participate in all depositions, pre-trial conferences, and hearings.

11. Counsel should file or make petitions, motions, responses, or objections when necessary.

12. At any court proceedings, counsel should present and cross-examine witnesses and offer exhibits as necessary, and, where appropriate, introduce evidence and make arguments on the client's behalf and ensure that a written order is made and conforms to the court's oral rulings and statutorily required findings and notices. Counsel should abide by the client's decisions about the representation with respect to each issue on which the client is competent to direct counsel. Counsel should pursue the client's expressed objectives, unless the client's objectives violate counsel's ethical duties or responsibilities as an officer of the Court.

13. After the initial disposition of the case, counsel should discuss the end of the legal representation with the client and discuss all avenues of appeal and other assistance in the future on behalf of the client.

14. When counsel's representation terminates, counsel shall cooperate with the client and any succeeding counsel in the transmission of the record, transcripts, file, and other pertinent information.

## **REPRESENTATION OF PARENTS OR A GUARDIAN IN A PROCEEDING FOR THE INVOLUNTARY COMMITMENT OF A DEVELOPMENTALLY DISABLED PERSON**

### **GOALS:**

- A. To actively and effectively represent the parents or guardian of a disabled person in a proceeding for the involuntary commitment of that person and to provide for the protection of their procedural rights pursuant to §53-20-112, MCA.**
- B. To serve the best interests of the parents or guardian and to be independent from the court and other participants in the litigation and be unprejudiced and uncompromised in representing them.**
- C. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf of the parents or guardian.**

### **I. TRAINING AND COMPETENCY:**

1. All attorneys representing parents or guardians of a disabled person who are the subject of a petition for involuntary commitment must have completed the minimum hours of training for involuntary commitment and developmentally disabled respondents, before being assigned the representation of such parents/or guardian.
2. Counsel should be familiar with all relevant statutes, rules, and case laws regarding and related to involuntary commitments in Montana.
3. In addition to basic legal knowledge, the attorneys must have and continue to develop basic trial skills, basic advocacy skills, relevant motion practice, and a sufficient understanding of writ and appellate practice to advise the parents or guardians whether and how to seek such remedies and to protect the record in the District Court.
4. Counsel should be familiar with the ~~Public~~public ~~Defender~~defender ~~Standards~~standards for representation of a respondent in a proceeding for involuntary commitment.

### **II. HANDLING THE CASE:**

1. Counsel should accept the appointment with the full understanding of the issues and functions to be performed. If counsel considers parts of the appointment to be confusing or incompatible with his or her ethical duties, counsel should inform the court of the conflict and ask the court to clarify or change the terms of the appointment.

2. Immediately after being appointed, counsel should review the file and should inform other parties and other counsel of his or her appointment, and that as counsel of record he or she should receive copies of pleadings, discovery exchanges, and reasonable notification of hearings and major changes of circumstances in the case.

3. Immediately after being appointed, counsel should meet with the parents/or guardian of the respondent, adapting all communications to their level of education, cognitive development, cultural background, and degree of language acquisition. Counsel should inform the parents/or guardian about the court system, the proceedings, and counsel's responsibilities. Counsel should elicit and assess the parents/or guardians views and concerns of the case.

4. Counsel should be aware of and protect all of the procedural rights guaranteed under §53-20-112, MCA, including:

- a. The right to be present at any hearing held pursuant to §53-20-101, ~~et al~~;
- b. Offer evidence and cross-examine witnesses at any hearing; and,
- c. Have the respondent examined by a professional person of ~~their~~ his or her choice.

5. Counsel should thoroughly explain to the parents or guardian the contents of the petition for commitment and discuss all practical and legal considerations that flow from the petition.

6. If the ~~Petition~~ petition provides a medical report, counsel should ascertain whether the physician indicates on the report his or her qualifications and that those qualifications are appropriate to make the recommendation regarding capacity or incapacity contained in the report.

7. If counsel believes it to be appropriate, or the parents or guardian request it, counsel should seek to have a medical evaluation of the disabled person completed by a professional person of their choice, and preserve said examination for further use on behalf of the respondent.

8. Counsel should conduct thorough, continuing, and independent investigations, including reviewing the respondent's social service records, mental health records, if applicable, drug and alcohol related records, medical records, law enforcement records, and other records relevant to the case.

9. Counsel should determine whether or not the respondent has an existing trust or durable power of attorney which may be relevant.

10. Counsel should be knowledgeable about all other alternatives and types of medical treatment for the respondent's disability and of the type and duration of treatment requested by the petition.



11. In preparation for court hearings, counsel needs to complete exhaustive trial preparation, witness preparation (~~of both lay and expert~~), witnesses, preparation of trial briefs and stipulations, and all evidentiary considerations.

12. Counsel should stay apprised of any other court proceedings affecting the respondent, the parties, or other household members.

13. If the client is a parent whose location is unknown, all standard means, such as (~~telephone book, internet, and punitive father registration, and etcetera~~) shall be used to locate the parent. Other parents or guardians who are available should be consulted as to the location of the missing parent. Counsel should use all due diligence in locating said missing parent.

14. At any court proceedings, counsel should present and cross-examine witnesses and offer exhibits as necessary, ~~and where appropriate~~ introduce evidence where appropriate, and make arguments on the parents' or guardian's behalf and ensure that a written order is made and conforms to the court's oral rulings and statutorily required findings and notices. Counsel should abide by the parents' or guardian's decisions about the representation with respect to each issue on which the parents or guardians are competent to direct counsel. Counsel should pursue the parents or guardians expressed objectives, unless their objectives violate counsel's ethical duties or responsibilities as an officer of the court.

15. Counsel should participate in, ~~and~~, when appropriate, initiate negotiations and settlement discussions. Counsel should also participate in all depositions, pre-trial conferences, and hearings.

16. Counsel should determine and advocate for, on behalf of the parents or guardians, whatever treatment alternatives meet the wishes of the parents or guardians. If counsel has reason to believe that the parents or guardians legitimate interests require investigation, counsel should request appropriate alternatives as may be allowed by the court.

17. After the initial disposition of the case, counsel should discuss the end of the legal representation with the parents or guardians and discuss all avenues of appeal and other assistance in the future on their behalf.

- a. When counsel's representation terminates, counsel shall cooperate with the parents or guardians and any succeeding counsel in the transmission of the record, transcripts, file, and other pertinent information.

## **REPRESENTATION OF A RESPONDENT IN A PROCEEDING FOR INVOLUNTARY COMMITMENT – ALCOHOLISM**

### **GOALS:**

- A. To actively and professionally act as a zealous advocate for the respondent who is the subject of a proceeding for commitment as an individual with alcoholism under §53-24-301 and 302, MCA.**
- B. To abide by mandatory standards of representation for Public Defenders as attorney for the respondent in a referral or an involuntary commitment proceeding.**
- C. To serve the stated interests of the respondent, to be independent from the court and other participants in the litigation, including the respondent's guardian, if any, and to be unprejudiced and uncompromised in representing the respondent.**
- D. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf of the respondent.**
- E. In the following standards, an involuntary commitment refers to both involuntary commitment and recommitment proceedings.**

### **I. TRAINING AND COMPETENCY:**

1. A public defender assigned to represent a respondent in an involuntary commitment proceeding shall have a thorough understanding of involuntary commitment law, as well as the specifics of §53-24-303 and 304, MCA, and of the chemical dependency and mental health systems.

2. To be eligible for assignment to represent respondents in involuntary commitment proceedings, counsel shall receive a minimum of ~~Eight~~ eight (8) hours of training and complete supervised on-the-job training in the duties, skills, and ethics of representing involuntary commitment respondents. This training shall include visits to a variety of treatment facilities, including the Montana Chemical Dependency Center, community service providers, and sober living group homes within the area served by the public defender. Counsel shall utilize training and support provided by the ~~office of the public defender~~ Office of the State Public Defender.

3. Counsel shall have basic knowledge of alcoholism and chemical dependence and the ability to read and understand medical terminology related to chemical dependence, addiction, alcoholism, and the medical and recovery treatment models.

Counsel shall be familiar with the medications used to treat alcoholism, addiction, and chemical dependence. Counsel shall be familiar with the roles of intervention, treatment, voluntary abstinence, and support groups in long-term abstinence and recovery. Counsel shall be aware of how chemical dependence, addiction, or active alcoholism will affect attorney-client communications and shall recognize that effective communication may require special efforts on the part of counsel.

4. Counsel should be familiar with other resources for persons who are addicted to alcohol or other drugs available either within the area served by the public defender or reasonably accessible by respondents. Included in these resources are recovery programs, such as twelve step recovery programs, public and private medical and treatment facilities. Counsel should be familiar with the local recovery community and locate resources and supports for respondents.

## **II. CASE PREPARATION:**

1. Counsel shall solicit the support of social workers, chemical dependency counselors, mental health professionals, and health care professional who understand the public defender's advocacy role to investigate the respondent's case and explore treatment, self-help, and support groups, as well as social services that may be available to the respondent in the community.

2. Counsel's role of advocate and advisor must be based on knowledge of the range of services available to respondent.

3. Counsel shall advise the respondent of all available options, as well as the practical and legal consequences of those options.

4. Counsel shall help the respondent determine the respondent's objectives by advising the respondent about the probability of success in pursuing those options. If the respondent expresses a desire to seek voluntary treatment or related social services, counsel must given the respondent the necessary and appropriate advice and assistance to pursue those desires.

5. Counsel shall advocate the respondent's express wishes. The primary role of counsel is to represent the perspective of the respondent alone, and not the perspective of the respondent's relatives, friends or guardians. In addition, counsel shall not substitute his or her judgment about what is in the best interests of the respondent. To the extent that a respondent is unable or unwilling to express personal wishes, counsel must presume that respondent does not wish to be involuntarily committed.

6. Counsel shall meet with respondent as soon as possible after notification of his or her assignment to an involuntary commitment case. This meeting shall be conducted in private and shall be held sufficiently before any scheduled hearing to permit effective preparation and allow pre-hearing assistance to the respondent.

7. When meeting with the respondent for the first time, counsel shall identify himself or herself by name and by affiliation if appropriate. If the first meeting takes place in a ~~health care~~healthcare facility, or a detention or ~~other~~ facility, counsel shall make it clear to the respondent that he/ or she is not a member of the facility staff. Counsel shall inform the respondent that their conversation is confidential, ~~and~~ that the matters they discuss should not be revealed to facility staff or others in order to preserve that confidentiality. Counsel shall also inform the respondent ~~and~~ that he/ or she has the right to remain silent prior to the commencement of any court-ordered examination and that the respondent cannot be examined without the presence of counsel.

8. During the conference, counsel shall obtain the respondent's version of the facts of the case, including:

- a. The circumstances surrounding the filing of the involuntary commitment;
- b. The names, addresses, and telephone numbers of all persons with knowledge of the circumstances surrounding the petition;
- c. Information about past treatment at any public or private treatment facility, medical detoxification facility, or any past psychiatric hospitalization;
- d. Information to aid the exploration of alternatives to commitment;
- e. The name of a chemical dependency expert or addictions medicine specialist of respondent's choice to conduct an independent evaluation.

9. During the conference, counsel shall also:

- a. Explain what is happening and why, including the basis on which the respondent's involuntary commitment is sought, and offer a description of the examination conducted by the physician and judicial hearing procedures;
- b. Explain the respondent's rights in the commitment process, including the right to treatment, the right to refuse treatment, and the right to an examination by a licensed physician of the respondent's choice;
- c. Explain that the respondent may retain his or her own counsel at his or her own expense rather than accept representation by the appointed public defender;
- d. Explain the respondent's option to accept voluntary treatment, the procedures to exercise that option, and the legal consequences of voluntary admission to a treatment facility ~~and~~; discuss whether the respondent is willing to accept voluntary treatment in a treatment facility;
- e. Obtain respondent's consent to enter into negotiations for settlement of the case with the county attorney and with chemical dependency professionals if the respondent is willing and able to give informed consent to voluntary care of related social services as an alternative to involuntary commitment;
- f. Discuss the desirability of a court hearing with the respondent; and,
- g. Request the respondent's written or oral permission to obtain access to relevant records, including any facility records and incident reports.

10. After being notified of appointment to the case, counsel shall, in preparation of any scheduled hearing, do the following:

- a. Become thoroughly familiar with the statutory requirements governing involuntary commitment in the jurisdiction as well as case law and court rules;
- b. Thoroughly review the petition or other documents used to initiate the commitment proceedings, any affidavits or statements in support thereof, the certificate of the examining physician, pre-hearing examination reports, the medical records of the respondent, ~~and~~ the facility records of any facility in which the respondent has recently resided and any other document relevant to the proceedings.
- c. Attempt to interview all persons who have knowledge of the circumstances surrounding the involuntary commitment petition:
  - i. The petitioner(s);
  - ii. The certifying physician, facility staff, social workers, mental health professionals, and other persons who have examined or treated the respondent during the current or any known previous involuntary commitment proceedings;
  - iii. Previous service providers, if any;
  - iv. The respondent's family, guardian or acquaintances;
  - v. Any law enforcement, emergency response or intervention personnel who may have previously been involved with respondent;
  - vi. Any persons who may provide relevant information or who may be supporting or adverse witnesses at a commitment hearing.
- d. Facilitate the exercise of the respondent's right to be examined by a professional person of the respondent's choice.

11. Counsel must ensure that the respondents consent to voluntary treatment is knowing and not a result of coercion or undue influence. Counsel shall explain the benefits and privileges of voluntary treatment and care to all respondents as a part of counsel's efforts to make respondents aware of all options available to them.

12. If the respondent indicates that he or she would consent to voluntary treatment, counsel shall:

- a. Ascertain whether the respondent was indeed aware that by electing to convert to voluntary status, he or she was agreeing to enter or remain in a health care facility; and,
- b. Make certain that this agreement was not the product of threats, unrealistic promise, or other forms of coercion.

13. If counsel has determined that the respondents consent to voluntary treatment is knowing and uncoerced, counsel shall immediately take steps to secure the dismissal of the involuntary commitment proceedings.

13. When, due to the respondent's disability, the effect of medication, or other factors, counsel is unable to determine that the conversion to voluntary patient status was

made knowingly and voluntary, he or she shall investigate the circumstances of the respondent's stated desire to voluntarily receive treatment.

### **III. COURT PROCEEDINGS:**

1. Counsel should seek the most expedient and timely resolution of the involuntary commitment proceeding possible while providing effective and zealous advocacy for the respondent. Counsel should only seek the continuance of any phase of the involuntary commitment proceeding if it is necessary to effectively advocate for the respondent.

2. Counsel should ensure that a respondent actively participates in every stage of the involuntary commitment proceeding. Counsel shall encourage the respondent to exercise his or her right to be present at all hearings. Counsel shall advise the respondent of the legal basis under which the court will order discharge, commitment, or recommitment, and the length of commitment.

3. Counsel shall avoid using his or her authority to waive respondent's presence at the hearing except in the following extraordinary cases:

- a. When the respondent unequivocally refuses to attend and cannot be encouraged to do so;
- b. When attending would seriously jeopardize the respondent's mental or physical condition; or,
- c. When the respondent's presence at the hearing would completely disrupt and prevent a meaningful proceeding.

4. If the respondent waives the right to be present, counsel shall make a record of his or her advice to the respondent regarding the right to be present and the choice to waive that right. In such circumstances, counsel shall make a record of the facts relevant to the respondent's absence from the hearing.

5. If, at the time of hearing, a respondent is under the influence of prescribed medications, drugs of abuse or alcohol, counsel shall consider introducing evidence regarding the nature of the medication and its likely effects upon the respondent's demeanor.

6. Counsel shall zealously and effectively engage in all aspects of trial advocacy.

7. Counsel shall be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in involuntary commitment proceedings, such as hospital and medical records.

8. Counsel shall focus the court's attention on the legal issues to be decided, such as whether the criteria for commitment have been met. Counsel shall plan objections to

the admissibility of evidence regarding previous commitment and pending criminal charges, if any, so as to preclude their consideration at least until the adjudicative issue of whether commitment is warranted has been determined.

9. During the involuntary commitment hearing, counsel shall, where it benefits the respondent, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:

- a. Whether there has been shown by clear and convincing evidence a real factual basis for determination that respondent is an alcoholic who habitually lacks self-control as to the use of alcoholic beverages;
- b. Whether there has been shown by clear and convincing evidence real factual basis for determination that respondent has threatened, attempted, or inflicted physical harm on another; and, unless committed, respondent is likely to inflict physical harm on another;
- c. Whether there has been shown by clear and convincing evidence a real factual basis for the determination or is incapacitated by alcohol of imminent danger;
- d. The factual basis of conclusory opinions about the respondent's suitability for commitment under the applicable legal standards; and,
- e. Whether there has been shown by clear and convincing evidence a real factual basis to determine that the department is able to provide adequate and appropriate treatment for the respondent and that the treatment is likely to be beneficial.

10. Counsel shall offer evidence favorable to the respondent's case and present lay and expert witnesses, including an impartial, independent addictions medicine expert, physician or chemical dependency counselor who has examined the respondent, if possible.

11. After discussions with the respondent and with his or her consent, counsel shall present all evidence available that is favorable to the respondent regarding appropriate alternatives to involuntary commitment, including, but not limited to, the availability of private treatment resources, the respondent's history of successful placement in the community, the availability of community-based services or other mechanisms to support the respondent in the community.

- a. Counsel shall offer evidence favorable to the respondent regarding the least restrictive placement for the commitment during the proceedings;
- b. Counsel shall also thoroughly examine and cross-examine adverse lay and expert witnesses, particularly regarding the factual basis of conclusory opinions about the necessity of committing the respondent to the most restrictive setting available, such as the Montana Chemical Dependency Center or other approved public treatment facility. Counsel shall explore and consider offering evidence of the respondent's compliance with previous treatment, success in community treatment programs, and family and other support in the community.

12. Counsel shall consider the condition of the respondent in determining the degree to which the hearing procedures shall conform strictly to the applicable rules, as some respondents may not be able to consent knowingly and voluntarily to the waiver of any procedural or evidentiary rights. Counsel shall argue strict application for the burden of proof and the law, ~~and, at all times, counsel shall endeavor to preserve the record for appeal.~~ Counsel shall review all orders and seek the amendment of orders as necessary, including the deletion of provisions not supported by the record.

13. Counsel shall provide continuity in representation for the respondent throughout the involuntary commitment process.

14. Counsel, who has represented a respondent ~~proceeding~~ preceding and during a court hearing, shall make every effort to maintain responsibility for the respondent's legal representation so long as the respondent remains committed.

15. If counsel, who represented the respondent during the commitment proceeding, does not continue to represent the respondent after commitment is ordered, he or she shall make all reasonable efforts to ensure that the respondent is well represented in all matters that stem from the respondent's commitment. Specific objectives include:

- a. A smooth transfer of responsibility to new counsel who assumes representation in post-hearing matters, including motions for amended findings, stays of the commitment order pending appeal, appeals, petitions for writs, periodic review hearings, recommitment proceedings, and other available legal actions to contest commitment; and
- b. Monitoring of the treatment and services provided a committed respondent to ensure the quality of the treatment and services.